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SEP 28 1981
ALEXANDER L. STEVAS,
CLERK

No. 81-118

In the Supreme Court of the United States

OCTOBER TERM, 1980

KEMLON PRODUCTS AND DEVELOPMENTS COMPANY, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

Edward D. Urquhart
Sponsel, Urquhart & Ross
50 Briar Hollow Lane, Suite 320 West
Houston, Texas 77027
(713) 840-0920
ATTORNEY FOR PETITIONERS

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The "Memorandum For the Respondents In Opposition" opposes the petition on three grounds, all of which are erroneous.

First, respondents charge that petitioners have not alleged any error in the court of appeals' holding that Kemlon failed as a matter of law to meet its burden of proving irreparable harm as required by *Enochs v. Williams Packing & Navigation Co.*, 370 U.S.1 (1962). Petitioners contend the specific issue of irreparable harm in this case is a subsidiary question fairly included within the "Question Presented" in the "Petition For Writ of Certiorari". Consistent with Rule 17, Rules of the Supreme Court, the petition herein was to direct the attention of this Honorable

Court to the "special and important reasons" warranting a review on writ of certiorari; namely, the hiatus in the statutory scheme of the Internal Revenue Code of not providing for "substantive due process" protection of taxpayers' rights to confidentiality and privacy.

In any event, petitioners have consistently maintained throughout the instant litigation that respondents waived the issue of irreparable harm in the district court. As pointed out in petitioner's brief to the court of appeals (pp. 43-45), the district court asked respondent's trial counsel if the government was not contesting the issue of irreparable harm and the reply was "That's correct". (Supplemental Record On Appeal, p. 46.) The reason respondent's trial counsel made such statement was that it had been previously agreed between the parties and the district court that respondents would only appeal the question of whether *Commissioner v. Shapiro,* 424 U.S. 614 (1976) provided the district court with jurisdiction to order respondents to provide petitioners with an opportunity to provide the unknown information being sought.

Once the court of appeals held respondents did not waive the issue of irreparable harm, petitioners explicitly contended error on this point in their petitions for panel rehearing and rehearing en banc. Especially noteworthy is the court of appeals' holding that "The Statements by the Service's attorney at the September 8, 1978, hearing, upon which Kemlon relies are ambiguous at best and do not support a finding of waiver of this issue" (Pet. App. A-13). Petitioners contend the statements by respondent's trial counsel were not ambiguous and that said counsel clearly agreed with the district court that the government was not contesting the issue of irreparable harm (See Supplemental Record On Appeal, p. 46).

After stating that respondent's trial counsel's statements were "ambiguous at best", the court of ap-

peals further gave the following two reasons for its holding that the government did not waive the issue of irreparable harm: (1) "the remainder of the record demonstrates the Service adamantly argued that Kemlon had not satisfied its burden of showing irreparable harm" (Pet. App. A-13) "and (2)" In the September 8, 1978, hearing, the Service expressly stated that there had been no stipulation with respect to the irreparable harm issue; rather the Service said that part of its argument was based on this element of the *Enochs* exception" (Pet. App. A-13-14).

With regard to the first reason, petitioners contend the remainder of the record on which the court of appeals relied [other than the September 8, 1978 hearing] occured, in time, prior to said hearing to-wit: the March 3, 1978, motion to dismiss (Record On Appeal, pp. 17-55) and the June 16, 1978, motion for reconsideration (Record on Appeal, pp. 87-106). It is after such dates that petitioners contend the government abandoned the issue of irreparable harm, i.e., at the September 8, 1978, hearing.

With regard to the second reason given by the court of appeals, petitioners contend it is erroneous wherein it states "the Service said that part of its' argument was based on this element [irreparable harm] of the *Enochs* exception" (Pet. App. A-14). In fact, however, the Service's attorney stated the following: "A part and parcel of our entire argument is to the extent there could be any harm, that harm could be repaired by the adequate remedy at law available...(Supplemented Record on Appeal, p. 44). It was after this statement that the Service's attorney went further and expressly admitted to the district court that the government was not contesting the issue of irreparable harm (Supplemental Record On Appeal, p. 46).

Therefore, it is clear that respondents were relying only on the adequate remedy at law issue along with their con-

tention that *Shapiro* was not applicable to this case. The "Petition for Writ of Certeriorari" filed in this case clearly demonstrates that petitioners remedy at law is inadequate and such argument will not be repeated herein.

Furthermore, respondents' argument regarding irreparable harm ignores the practical difficulties of a taxpayer being able to prove irreparable harm in a situation such as petitioners were placed in the district court. Petitioners had given the internal revenue agents valuable confidential information during the IRS audit. Although petitioners cooperated during the IRS audit, petitioners have never been allowed to know what questions the internal revenue agents desired to ask their customers regarding such information. Petitioners were never given the opportunity to provide the unknown information the internal revenue agents were seeking. Therefore, the court of appeals' opinion retroactively places petitioners in the predicament of having to prove that asking the questions would result in irreparable harm, without knowing the questions.

The districts court's May 22, 1978, "Order" ordered respondents to provide petitioners with the unknown list of questions, so that petitioners would have a fair opportunity to prove that the government could not ultimately prevail. (Pet. App. A-25-26.) Had respondents simply complied with such order of the district court, petitioners would have been able to address the issue of irreparable harm along with the issues under 26 U.S.C.A. Section 6103(K)(6) of whether the information sought was necessary or otherwise reasonably available. Also had respondents complied with such order of the district court, petitioners would thereby have been allowed "substantive due process" protection of their rights to privacy and confidentiality as they clearly have not been allowed by the holding of the court of appeals. Therefore, the issue of ir-

reparable harm in this case in a subsidiary question fairly included within the "Question Presented" in the "Petition for Writ of Certiorari", as allowed by Rule 21.1(a), Rules of the Supreme Court.

Respondents' second ground in their opposition brief, concerns the showing the government is required to make under the *Shapiro* case. (Memo. In Opp. pp. 4-5.) First, respondents erroneously contend the *Shapiro* case held that the government is only required to demonstrate that it might ultimately prevail after the taxpayer has made a showing of irreparable harm. To the contrary, the *Shapiro* case simply does not make such holding regarding the timing of the proff of the elements of the judicially created exception to the Anti-Injunction Act in *Enochs v. Williams Packing & Navigation Co.*, 370 U.S. 1 (1962). In fact, the Court in *Shapiro* stated the following:

> This Court has recently and repeatedly held that, at least where irreparable harm *may* result from a deprivation of property pending final adjudication of the rights of the parties, the Due Process Clause required that the party whose property is taken be given an opportunity for the same kind of predeprivation or prompt past deprivation hearing at which some showing of the probable validity of the deprivation must be made. 424 U.S. at 629. (Emphasis Added)

The above quoted word "may" certainly implies that the taxpayer does not have to complete the proff of the irreparable harm element before the government is required to show the probable validity of the deprivation. On this very point, in *U.S. v First Nat'l City Bank,* 568 F.2d 853 (2nd Cir. 1977) the Second Circuit interpreted the holding of *Shapiro* as being that "a taxpayer would be entitled to injunctive relief if (1) he could show a *likelihood* of irreparable harm and (2) the Government could not establish a factual basis for its assesment." 568 F.2d at 856. (Emphasis Added). The district court in the instant case held in its May 22, 1978, "Order", that "plaintiffs have

made a substantial claim of irreparable injury as required by *Enochs.*" (Pet. App. A-25) The court of appeals' opinion did not hold that the district court abused its discretion in making such a holding. Furthermore, the district court's "Findings of Fact and Conclusions of Law" specifically held that petitioners had established irreparable harm as a result of respondents' statements that the government was not contesting the issue of irreparable harm. (Pet. App. A-28-32.) The court of appeals' opinion also did not hold the district court abused its discretion in making such further holdings. For the above reasons, therefore, petitioners contend respondents' argument is in error wherein it implies the government was not required to make any showing under *Shapiro.* Also, respondents' contention that "petitioners do not dispute the court of appeals' conclusion that government made" the requisite showing under *Shapiro* erroneously ignores the language of the petition at pages 12-13 thereof.

Respondents' argument regarding the timing of the proof of the element of irreparable harm also ignores the requirement of *Shapiro* and *Phillips,* as more fully explained in the petition filed herein, that there must be an opportunity for a full adjudication on the ments, i.e., "substantive due process," before the government can proceed upon a mere showing that its proposed action is possibly correct.

Respondents' third and final ground in its opposition brief first contends petitioners' constitutional right to privacy argument is only concerned with the fact that they are being audited. The record in this case is clear that petitioners were and are primarily concerned about the valuable and confidential information they voluntarily turned over to the internal revenue agents. Petitioners do know that questions to their customers concerning such information could very easily destroy the value of such information. Until petitioners allowed a full adjudication on

the merits of the validity of the government's unknown questions, they are simply being denied "substantive due process" protection of their right to privacy as explained in the petition filed herein.

Second, respondents' contention that petitioners' commencement of this suit to protect their right to privacy destroys their right to privacy is patently absurd. A holding by any court to such effect would totally eviscerate all statutory and constitutional rights to privacy and confidentiality.

Finally, respondents contention that petitioners did not argue the constitutional right to privacy issue before the court of appeals is in error. A review of petitioners' brief to the court of appeals, at pages 28-29 and 31-43 thereof, clearly shows that petitioners did make such argument to the court of appeals. Furthermore, the court of appeals' original opinion, at footnote 8, acknowledged that petitioners raised such argument, but erroneously held that it would not consider such argument because petitioners did not cross-appeal the district courts ruling against such argument. After petitioners pointed out the error of such holding in their petitions for rehearins, via the holding in *Massachusetts Mut. Life Ins. Co. v Ludwig,* 426 U.S. 479 (1976), the court of appeals inconsistently and despite petitioners' brief, held on rehearing that petitioners had not raised such argument on appeal.

It is therefore, respectfully submitted that the petition for a writ of certiorari should be granted.

Respectfully submitted,

Edward D. Urquhart
Sponsel, Urquhart & Ross
50 Briar Hollow Lane, Suite 320 West
Houston, Texas 77027
(713) 840-0920
ATTORNEY FOR PETITIONERS